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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. 259 [redacted]

KENNEDY BOOK STORE, INC., - - Petitioner,

versus

DEPARTMENT OF REVENUE;
DEPARTMENT OF REVENUE, EX REL. JAMES E. LUCKETT, Commissioner of Revenue; and
KENTUCKY BOARD OF TAX APPEALS, - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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June , 1970.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2–3
Statement of the Case	3–9
Reasons for Granting the Writ: The Decision Below Presents a Substantial Question Under the Equal Protection Clause of the 14th Amendment Because Its Result Was to Grant a Shockingly Unfair and Unjust Competitive Advantage to the Petitioner's Only Competitor	9–13
Conclusion	13
Appendix	15–37
Opinion of Court of Appeals of Kentucky	15–19
Mandate of Court of Appeals	20
Petition of Appeal to Fayette Circuit Court	21–25
Opinion of Fayette Circuit Court	25–29
14th Amendment	30
Section 170, Kentucky Constitution	30
KRS 139.200	30
KRS 139.210	31
KRS 139.310	31
KRS 139.470(1)	31
Sales and Use Tax Regulations	31–37
SU 12-1	31–33
SU 14-1	33–35
SU 38	35
SU 90	35–37

Citations:

	PAGE
KRS 139.210	9
SU 12-1	10
Hooven & Allison Co. v. Evatt, 65 S. Ct. 870, 874, 324 U. S. 652, 659	10
Kern-Limerick, Inc. v. Scurlock, 74 S. Ct. 403, 410, 347 U. S. 110, 121	10
Marcum v. City of Louisville Municipal Housing Com'n., Ky., 1964, 374 S. W. 2d 865, 866, 869	11
SU 90	11–12
SU 14-1	12
KRS 139.470	12
Section 170, Kentucky Constitution	12
SU 38	12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. _____

KENNEDY BOOK STORE, INC., - - - *Petitioner,*

v.

DEPARTMENT OF REVENUE;
DEPARTMENT OF REVENUE, EX REL. JAMES E. LUCKETT, Commissioner of Revenue;
JAMES E. LUCKETT, Commissioner of Revenue; and
KENTUCKY BOARD OF TAX APPEALS, - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

The petitioner, Kennedy Book Store, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Kentucky entered in this proceeding on February 6, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals of Kentucky is officially reported in 450 S. W. 2d 524, and a copy appears in the Appendix hereto. The opinion of the Fayette Circuit Court was not reported. A copy thereof is contained in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals of Kentucky was entered on February 6, 1970. A timely petition for rehearing was denied on March 20, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED.

Whether the refusal of the Kentucky Department of Revenue to grant petitioner the identical relief from Kentucky sales tax that it accorded to petitioner's only competitor in contravention of the department's own regulations was a violation of petitioner's rights to Equal Protection of the Laws under the 14th Amendment to the Constitution.

STATUTORY PROVISIONS INVOLVED.

14th Amendment . . . . . Appendix, p. 29
Section 170 of the Kentucky Constitution . . . . . Appendix, p. 30
KRS 139.200 (imposition of sales tax) . . . . . Appendix, p. 30
KRS 139.210 (collection by retailer from consumer) . . . . . Appendix, p. 31
KRS 139.310 (imposition of use tax) . . . . . Appendix, p. 31
KRS 139.470(1) (exemptions from tax) . . . . . Appendix, p. 31

Sales and Use Tax Regulations:
SU 12-1 (educational institutions) ..... Appendix, pp. 31-32
SU 14-1 (religious institutions) ..... Appendix, pp. 33-35
SU 38 (sales to state and local agencies) ..... Appendix, p. 35
SU 90 (deductions for sales to exempt purchasers) .... Appendix, pp. 35-37

STATEMENT OF THE CASE.

This case arises out of Kentucky's enactment and respondent Department of Revenue's administration of a three percent (3%) general sales and use tax that became effective on July 1, 1960. The representative tax period involved is 1/1/63 through 11/30/64 and the tax in controversy for that period is $21,600.82. Petitioner's business is the operation of a college bookstore; i.e., it sells textbooks, workbooks, classroom aids, etc., to college students and faculty.

The petitioner, Kennedy Book Store, Inc., (herein called "Kennedy") has operated an off-campus college bookstore across the street from the campus of the University of Kentucky (herein called "U.K.") since 1950. Its only competitor has been a college bookstore situated on the U.K. campus. Until June 28, 1964, the latter bookstore was privately operated by an individual under a lease arrangement with U.K. On that date its operation was taken over by U.K. for the purpose of avoiding the imposition of Kentucky's 3% sales tax.

At the time the Kentucky sales tax became effective on July 1, 1960, Kennedy's manager maintained close contact with the individual operating the U.K. campus bookstore to insure that both stores would operate identically with respect to the sales tax. In the beginning both bookstores collected the sales tax from customers and remitted it to the Revenue Department on all sales. However, U.K. officials thereafter directed the individual (James Morris) operating the campus bookstore to cease collecting sales tax from students and faculty on sales of "essential educational" items (e.g., textbooks, workbooks, classroom aids). As a result, Mr. Morris commenced collecting sales tax only on his sales of "non-educational" items (e.g., tobaccos, sundries) and Kennedy did likewise. Later, the Revenue Department informed both Morris and Kennedy that sales tax must be charged on all sales or not at all. Morris then ceased collecting sales tax on sales of "non-educational" items and Kennedy again did likewise. When Morris complained to U.K. officials that he was being forced to absorb the sales tax on his receipts from all sales, a compromise was effected between U.K. and Morris whereby he paid one-half of the sales tax and U.K. the other one-half. Shortly thereafter U.K. terminated Morris' lease and took over the operation of the campus bookstore.

From then on the Revenue Department required the U.K. bookstore to pay sales tax only on its sales of "non-educational" items while requiring Kennedy to pay sales tax on all of its sales. In order to compete with the U.K. bookstore Kennedy was forced to ab-

sorb the 3% sales tax on all its sales and did not pass it along to its customers.

Kennedy appealed the Revenue Department's ruling that it was liable for sales tax on all its sales to the Kentucky Board of Tax Appeals. At a *de novo* hearing before that body the foregoing facts were developed. In addition, evidence was introduced that established that Kennedy's bookstore operations were identical to U.K. in the following respects:

1. Each store depends on U.K. students and faculty for most of its business;

2. Each store derives more than ¾ of its total receipts from sales of "essential educational" items to U.K. faculty and students;

3. Each store buys and resells "essential educational" items at identical prices;

4. Each store supplies approximately 50% of the total "essential educational" items purchased by U.K. students and faculty;

5. Each store's sales to the general public account for less than 5% of its total sales;

6. Neither store has collected sales tax on any retail sales;

7. Each store has absorbed and paid to the Department sales tax on its sales of "non-educational" items;

8. Each store is operated for profit (U.K.'s store earned a profit of $89,000.00 in the 1964-65 fiscal year).

The Revenue Department contended that because the U.K. bookstore was owned and operated by U.K. it did not have to pay sales tax on its sales of "essential educational" items; but that Kennedy was sub-

ject to sales tax on all of its sales because it was privately owned and operated.

Although the respondents introduced no proof at the hearing before the Board of Tax Appeals, that body affirmed the final ruling of the Revenue Department and upheld the assessment. Petitioner appealed the final order of the Board of Tax Appeals to the Fayette Circuit Court. It alleged in its petition for appeal the following:

> "B. The Board erred in failing to hold, under the facts presented, that the Department of Revenue has denied the appellant the 'Equal Protection of the Laws' in taxing appellant on its sales of essential educational items while exempting from the sales tax receipts from sales of essential educational items made by book stores owned by the University of Kentucky and all other Kentucky colleges, both public and private.
>
> "C. The Board erred in refusing to hold, under the facts presented, that the Department of Revenue's failure to enforce Regulation SU 12-1 against appellant's only competitor, the University of Kentucky book store, must result in voiding the additional sales tax assessed against appellant in order to afford appellant the 'Equal Protection of the Laws'."

The Fayette Circuit Court entered judgment affirming the order of the Board of Tax Appeals saying, in a separate opinion, that:

> "The appellant next raises the argument that the Department has acted unreasonably, discrim-

inatorily and arbitrarily in refusing to extend to the appellant the benefits of its regulations relating to educational institutions and in its enforcement of said regulation so as to deny appellant his constitutional right of equal protection of the laws under both the United States Constitution and the Kentucky Constitution. There is no evidence in the record that the Department of Revenue acted unreasonably, discriminatorily or arbitrarily in the adoption of Regulation SU 12-1.

"As to the enforcement of Regulation SU 12-1, the appellant raises the point that in order to be exempt from the sales tax the University of Kentucky bookstore should not be open to the general public as stated in the regulation. The evidence establishes that both the University of Kentucky bookstore and Murray University bookstores are open to the general public. There is no evidence in the record, however, to indicate that the Department of Revenue was aware that these bookstores were open to the general public and we do not feel that because of some failure on the part of the Department of Revenue to strictly enforce Regulation SU 12-1 it would indicate any discrimination against the appellant so as to relieve it of its obligation to pay the sales tax under the applicable statute."

On appeal to the Court of Appeals of Kentucky petitioner raised the following 14th Amendment issue in its original brief:

"*Question No. 1:* Has the Department Violated Section 2 of the Kentucky Constitution and

the Equal Protection Clause of the U. S. Constitution in Refusing to Grant Administrative Relief to Kennedy?"

On February 6, 1970, the Court of Appeals issued its opinion affirming the judgment of the Fayette Circuit Court stating:

> "Kennedy contends that the precepts of City of Ashland v. Heck's Inc., Ky., 407 S. W. 2d 421, and Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, impel the conclusion that the Department has discriminated against it by reason of its disparate administration of the sales-tax regulations. We are not so persuaded.
>
> "If UK is entitled to exemption by virtue of Section 170 of the Kentucky Constitution (which Kennedy seems to concede), then Kennedy has no ground for complaint, because it is obvious that the constitution extends no exemption to Kennedy. We cannot characterize the Department's exemption of UK, based on the Department's belief as expressed in its brief (and assumed by Kennedy) that UK is exempted by Section 170 of the Kentucky Constitution, as arbitrary or as resulting in a proscribed discrimination.
>
> "Neither is there any basis for deeming arbitrary the Department's administration of SU-1 because of UK's sales of five percent to the general public. In the first place, there was no showing that the Department had knowledge of UK's sales to the general public; hence, its actions respecting the regulation could hardly be deemed 'deliberate' or 'willful.' The relatively small amount of sales to the general public is 'de minimis' and

does not sustain a claimed course of arbitrary action, or nonaction, by the Department. Obviously, if UK is an exempt vendor, the Department may not require it to pay any sales tax on any of its sales. We express no opinion as to the validity of any of the Department's regulations to which we have adverted."

REASONS FOR GRANTING THE WRIT.

The Decision Below Presents a Substantial Question Under the Equal Protection Clause of the 14th Amendment Because Its Result Was to Grant a Shockingly Unfair and Unjust Competitive Advantage to the Petitioner's Only Competitor.

At the time the Kentucky sales tax became effective, the petitioner bookstore's only competitor was a privately operated (under lease from U.K.) on-campus bookstore. Both petitioner and his aforesaid competitor originally collected sales tax on all retail sales and remitted the tax to the Revenue Department. Despite the fact that under KRS 139.210 the retailer is given the right to collect the sales tax from its purchasers, U. of K. officials intervened and directed the lessee operator of the campus bookstore to cease collecting sales tax on the store's sales of "essential educational items." As a result, both U. K.'s lessee and petitioner commenced charging sales tax only on their respective sales of "non-educational items." However, at that point the respondent Department of Revenue stepped in and directed the lessee and the petitioner to either collect sales tax on all sales or none. For a while thereafter U. K. paid one-half of its lessee's sales tax liability.

However, in the end it canceled the lease; took over operation of the campus bookstore and thereby became the petitioner's only competitor; ceased paying sales tax on its sales of "educational items;" and made $89,000.00 profit during its first 12 months of operation.

The respondent Department of Revenue did not require the U. K. bookstore (after U. K. took over its operation) to pay sales tax on its sales of "educational items," despite the fact that it was open to the general public in violation of the respondent Revenue Department's own regulation SU 12-1 (Appendix, pp. 31-32). In this regard, the Court of Appeals of Kentucky's finding that "the relatively small amount of sales to the general public is 'de minimis' and does not sustain a claimed course of arbitrary action or non-action by the Department" may be reviewed by this Court. As stated in *Hooven & Allison Co.* v. *Evatt*, 65 S. Ct. 870, 874, 324 U. S. 652, 659:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to re-examine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained."

See also *Kern-Limerick, Inc.* v. *Scurlock*, 74 S. Ct. 403, 410, 347 U. S. 110, 121.

Further proof that the respondent Revenue Department's refusal to grant this petitioner administrative relief equal to that extended to petitioner's only competitor (*i.e.*, the state-owned bookstore) was shockingly wrong is found in the unusually broad powers it has otherwise exercised in administering Kentucky's Sales and Use Tax Act.

Despite the fact that the Court of Appeals of Kentucky in *Marcum* v. *City of Louisville Municipal Housing Com'n.*, Ky., 374 S. W. 2d 865, 866, 869 (1964), held that:

> ". . . It is just as apparent the legislature intended to place the legal incidence of the sales tax on the retailer, even though the economic burden might be passed on to the consumer.
>
> ". . . We have shown that the sales tax is not a tax upon the appellee, and appellee is not exempt from bearing the burden of the tax which may be passed on to it by a utility company . . .,"

The respondent Revenue Department in its Regulation SU 90 (Appendix, pp. 35-37) exempted private retailers from the sales tax otherwise due on their sales to charitable and educational institutions and hospitals; stating in the Regulation's preamble that:

> "The intent of this regulation is to reconcile administration by the Department of Revenue of the provisions of Chapter 139, Kentucky Revised Statutes, as they apply to sales by retailers to institutions of purely public charity, non-profit charitable hospitals, institutions of education, and exempt federal agencies with the *requirements of*

the Fourteenth Amendment to the Constitution of the United States and of Section 170 of the Constitution of Kentucky." (Emphasis added.)

In the case of "any church . . . its agencies and its parent or governing body" the respondent Revenue Department's Regulation SU 14-1 (Appendix, pp. 33-34) exempted retailers from sales tax on their sales to such religious purchasers. It was adopted in the face of the limited exemption contained in KRS 139.470 (Appendix, p. 31) and Section 170 of the Kentucky Constitution. (Appendix, p. 30) and the latter's strict construction by the Court of Appeals of Kentucky:

> "It runs throughout the cases discussed above that the exemption accorded property used for religious purposes under Section 170 of our Constitution is to be construed strictly; whereas, the exemption accorded charitable and educational institutions construed liberally . . . ." *City of Ashland* v. *Calvary Protestant Episcopal Ch.*, Ky., 1955, 278 S. W. 2d 708, 712.

At the other extreme the respondent Revenue Department provided in Regulation SU 38 (Appendix, p. 35) that:

> "Sales to and by the state, its agencies and instrumentalities, and its political subdivisions (*e.g.*, counties and municipalities) must be included in the taxable gross receipts of the seller."

In the face of the foregoing, the petitioner has been denied equal tax treatment with its only competitor—a state-owned bookstore. Equality of treatment could

have been achieved either by requiring the state-owned competitor to pay sales tax on all of its sales or by exempting petitioner to the same extent that its only competitor was exempt.

The failure to so do was a gross violation of petitioner's right to equal protection of the laws.

CONCLUSION.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

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June , 1970.

COURT OF APPEALS OF KENTUCKY

RENDERED: FEBRUARY 6, 1970

File No. W-199-68

KENNEDY BOOK STORE, INC., - - - - - *Appellant,*

v.

DEPARTMENT OF REVENUE, ETC., ET AL., - *Appellees.*

Appeal from Fayette Circuit Court,
Honorable I. T. Grant, Judge.

OPINION OF THE COURT BY COMMISSIONER DAVIS—AFFIRMING.

The appellant challenges a judgment upholding an order of the Kentucky Board of Tax Appeals which sustained a deficiency sales-tax assessment against it in the amount of $21,600.82 for the period of January 1, 1963, through November 30, 1964. It will be necessary to relate some of the factual background before discussing the specific questions raised on the appeal.

The appellant (Kennedy) operates a book store adjacent to the campus of the University of Kentucky at Lexington. The University of Kentucky (UK) operates a book store on its campus. Each of these stores derives more than three-fourths of its total retail receipts from sales of required textbooks and other essential educational items to students and faculty members of UK. Only about five percent or less of the total retail receipts of either store results from sales to the general public, as distinguished from the students and faculty of UK. Both stores have operated prof-

itably and have offered merchandise at competitive and substantially identical prices. Neither store has collected sales tax from its customers on any of its retail sales, but each of them has absorbed and paid the sales tax computed on the gross sales of noneducational items such as clothing, phonographs, and the like.

Kennedy asserts that two questions are at issue:

(1) "Has the Department violated Section 2 of the Kentucky Constitution and the Equal Protection Clause of the U. S. Constitution in refusing to grant administrative relief to Kennedy?"

(2) "Is Kennedy entitled to be relieved of sales tax on its receipts from sales of essential educational items by reason of the Department's failure to enforce SU 12-1 against institutional book stores?"

Kennedy points out that its operations are essentially the same as UK's as respects identity of patrons, type of business, and receipts. It correctly observes that the sales tax provided by KRS Chapter 139 is levied on the vendor, whereas the use tax imposed by the same chapter falls upon the vendee. Marcum v. City of Louisville, Ky., 374 S. W. 2d 865.

Kennedy then refers to various regulations promulgated by the Department, only one of which is directly involved in the present case. By virtue of Regulations SU 90, SU 12-1, SU 38, and SU 14-1, the Department has undertaken to afford exemptions from the incidence of the sales tax in varying circumstances. In summary, SU 90 purports to relieve retailers of sales-tax liability as to receipts from sales to charitable and educational institutions in certain situations. SU 12-1 prescribes sales-tax immunity as to the gross receipts from sales by an institution of education, with specified limitations. SU 12-1 contains as an "exam-

ple" of an exempt activity by an institution of education: "School book and supply stores which are managed and operated by and as a part of the school and are not open to the public." Even such an operation is not exempted as to receipts from sales of merchandise "outside of the educational function."

SU 38 tersely notes that sales to and by the state, its agencies and instrumentalities, and its political subdivisions must be included in the taxable gross receipts of the seller, whereas SU 14-1 provides for exclusion of a vendor's receipts arising from sales to religious institutions.

Kennedy contends that the obvious purpose of the regulations is to afford protection to Kentucky retailers from the competitive disadvantages which would result from a vendor-type sales tax without the regulations. The difficulty, from Kennedy's point of view, is that no regulatory relief has been extended to it, even though it has to compete with UK to which administrative relief has been afforded. Moreover, says Kennedy, UK's book-store operation does not earn any sales-tax exemption by virtue of SU 12-1 because UK does sell at least five percent of its merchandise to the general public.

The thrust of Kennedy's argument appears to be: Since the Department, by the various regulations discussed, has undertaken to effect tax relief for some taxpayers, when adversely affected because of competition involving "exempt" vendors and "exempt" vendees, its failure to provide such relief for Kennedy is arbitrary within the contravention of Kentucky Constitution Section 2 and violative of the equal-protection clause of the Fourteenth Amendment of the United States Constitution. In taking this approach Kennedy *assumes*, as does the Department, that UK is an exempt vendor because of Section 170 of the Kentucky Constitution. Although we need not and do not resolve that

question, we note that Kennedy's assumption that UK is an exempt vendor by virtue of Section 170 of the Kentucky Constitution relieves us of the necessity of exploring that matter in this case.

Kennedy contends that the precepts of City of Ashland v. Heck's Inc., Ky., 407 S. W. 2d 421, and Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, impel the conclusion that the Department has discriminated against it by reason of its disparate administration of the sales-tax regulations. We are not so persuaded.

If UK is entitled to exemption by virtue of Section 170 of the Kentucky Constitution (which Kennedy seems to concede), then Kennedy has no ground for complaint, because it is obvious that the constitution extends no exemption to Kennedy. We cannot characterize the Department's exemption of UK, based on the Department's belief as expressed in its brief (and assumed by Kennedy) that UK is exempted by Section 170 of the Kentucky Constitution, as arbitrary or as resulting in a proscribed discrimination.

Neither is there any basis for deeming arbitrary the Department's administration of SU 12-1 because of UK's sales of five percent to the general public. In the first place, there was no showing that the Department had knowledge of UK's sales to the general public; hence, its actions respecting the regulation could hardly be deemed "deliberate" or "willful". The relatively small amount of sales to the general public is "de minimis" and does not sustain a claimed course of arbitrary action, or nonaction, by the Department. Obviously, if UK is an exempt vendor, the Department may not require it to pay any sales tax on any of its sales. We express no opinion as to the validity of any of the Department's regulations to which we have adverted.

We have not discussed and do not decide the Department's claim that the issue at bar has been foreclosed by a previous administrative ruling.

The judgment is affirmed.

All concur.

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MANDATE.

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

DICK VERMILLION, C. C. A.
By (s) John C. Scott, D. C.

Issued March 20, 1970.

FAYETTE CIRCUIT COURT

Civil Action No. 20423

KENNEDY BOOK STORE, INC., - - - - - *Appellant,*

v.

DEPARTMENT OF REVENUE,
DEPARTMENT OF REVENUE, EX REL. JAMES E. LUCKETT, Commissioner of Revenue, and
JAMES E. LUCKETT, Commissioner of Revenue, - - - - - - - - - *Appellees.*

PETITION OF APPEAL PURSUANT TO KRS 131.370 FROM ORDER No. K-781 OF THE KENTUCKY BOARD OF TAX APPEALS.

Comes the appellant, Kennedy Book Store, Inc., a corporation, and for its petition of appeal pursuant to KRS 131.370 from Order No. K-781 of the Kentucky Board of Tax Appeals, states the following:

1. Appellant is a corporation residing in Fayette County, Kentucky, and conducts its place of business in Lexington, Fayette County, Kentucky.

2. An attested copy of the final order of the Kentucky Board of Tax Appeals appealed from is annexed hereto as "Exhibit A." Said order became final on March 23rd, 1967, and this appellant is and was aggrieved by said final order.

3. A copy of this petition for appeal has been filed with the Kentucky Board of Tax Appeals by mailing, pos-

tage prepaid, on this ____ day of April, 1967, a copy hereof by registered mail, return receipt requested, to:

Kentucky Board of Tax Appeals
New Capitol Annex Building
Frankfort, Kentucky 40601

attached to a letter requesting that it be filed.

4. A copy of this petition for appeal has been filed with the appellees herein by mailing, postage prepaid, on this ____ day of April, 1967, a copy hereof by registered mail, return receipt requested, to:

James E. Luckett
Commissioner of Revenue
Kentucky Department of Revenue
New Capitol Annex Building
Frankfort, Kentucky 40601,

attached to a letter requesting that it be filed.

5. The grounds upon which review is sought are as follows:

A. The Board erred as a matter of law in failing to make written findings as required under KRS 131.160.

B. The Board erred as a matter of law in basing its order herein appealed from on Kentucky Tax Commission Order No. 3517, entered on June 26, 1964.

C. The Board erred as a matter of law in affirming the assessment of additional sales tax against appellant by the Department of Revenue in the amount of $21,600.82, or in any amount.

6. The errors relied on by appellant are as follows:

A. The Board's Order No. K-781 does not comply with the requirements of KRS 131.160 that: "The Kentucky Board of Tax Appeals shall make written findings on which its orders * * * are based." Among the findings the Board failed to make, that are required under the testimony and exhibits received in evidence before the Board are:

i. During the period involved the appellant did not collect any sales or use tax from its customers on any of its sales by means of the bracket system or any other method.

ii. During the period involved all book stores operated by both private and public colleges and universities in Kentucky were open to business from the general public and did do business with members of the general public.

iii. During the period involved the appellant performed services for students and faculty of the University of Kentucky that were identical to those rendered to said students and faculty by the book store owned and operated by the University of Kentucky.

iv. During the period involved the appellant's only business competitor was then the bookstore owned and operated by the University of Kentucky.

v. During the period involved the appellant paid sales tax on its receipts from sales of non-essential items to its customers.

vi. During the period involved, all book stores owned and operated by colleges and universities, both public and private, were required by the Department of Revenue to pay sales tax only on their respective receipts from sales of non-essential items.

vii. During the period involved, all book stores owned and operated by colleges and universities, both public and private, were operated for the primary purpose of making a profit.

viii. Except in the instance of this appellant, the Department of Revenue has not hesitated to grant relief by administrative action to Kentucky retailers threatened with competition from retailers exempt from collecting or paying the sales and use tax, where such competition was the result of the sales and use tax.

ix. The failure of the Department of Revenue to accord this appellant the same treatment it accords to the book store owned and operated by the University of Kentucky has, in effect, resulted in this appellant being required to pay sales taxes to support its only competitor.

B. The Board erred in failing to hold, under the facts presented, that the Department of Revenue has denied the appellant the "Equal Protection of the Laws" in taxing appellant on its sales of essential educational items while exempting from the sales tax receipts from sales of essential educational items made by book stores owned by the University of Kentucky and all other Kentucky colleges, both public and private.

C. The Board erred in refusing to hold, under the facts presented, that the Department of Revenue's failure to enforce Regulation SU 12-1 against appellant's only competitor, the University of Kentucky book store, must result in voiding the additional sales tax assessed against appellant in order to afford appellant the "Equal Protection of the Laws."

D. The Board erred in refusing to hold that the Department of Revenue acted arbitrarily and unreasonably in refusing to grant to appellant the benefits of its established administrative policy of protecting private Kentucky retailers from competition emanating from the tax exemption contained in Section 170 of the Kentucky Constitution.

Wherefore appellants demand: that summons issue directing the Department of Revenue to answer within twenty days after service thereof and directing the Kentucky Board of Tax Appeals to transmit its entire original record, properly certified, to the Clerk of the Fayette Circuit Court, after certifying that such record is the entire original record; that this Court review said record in accordance with the provisions of KRS 131.170 and grant to

this appellant all relief to which it may appear entitled; and its costs herein expended.

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OPINION.

This case is before the court on an appeal taken pursuant to KRS 131.370 from a final order of the Kentucky Board of Tax Appeals (hereinafter referred to as the Board) entered on March 23, 1967. Said order upheld a ruling of the Department of Revenue assessing the appellant for a sales tax deficiency in the sum of $21,600.82 plus interest for the period January 1, 1963 through November 30, 1964.

A formal hearing was held in this case before the Board but we fail to find any controversy relating to the facts of this case.

In their findings of fact the Board found that the appellant was a private corporation which operated an "off campus" bookstore across the street from the campus of the University of Kentucky in Lexington, Kentucky, and its customers primarily consisted of teachers employed by and students of the University of Kentucky.

The Board further found that the sales and use tax law or the Kentucky constitution did not exempt the appellant from the payment of sales tax on merchandise sold by it.

The record before the court reveals that the appellant, in an effort to remain competitive with the University of

Kentucky bookstore, does not pass on the sales tax to its customers under the bracket system but does pay a sales tax on what it determines as the sale of non-essential items. These items consist of merchandise which is not ordinarily used in the classroom at the University of Kentucky. The appellant paid no sales tax on what it determined to be the sale of essential items or merchandise used in the classroom at the University of Kentucky.

The University of Kentucky bookstore likewise does not collect a sales tax from its customers under the bracket system but pays the sales tax on what it determines as the sale of non-essential items but pays no sales tax on what it determines as the sale of essential items or merchandise used in the classroom at the University of Kentucky.

Subsequent to the enactment of KRS Chapter 139, the Department of Revenue adopted a regulation SU 12-1 pursuant to KRS 131.130 which exempted from the sales tax gross receipts from sales by institutions of education if such sales were made directly within their function as an educational institution. A campus bookstore which was managed and operated by and as a part of the school and was not open to the general public was cited as an example of sales which would be exempted in the regulation.

The appellant raises several points to sustain its position that it should be relieved of payment of the sales tax on the sale of essential items used in the classroom at the University of Kentucky.

The first point raised by the appellant is that the Board failed to make written findings of fact which it contends was necessary under KRS 131.370. The Board did make sufficient findings of fact for the purposes of this case. We are of the opinion that there is no factual issue in controversy. The primary issue as we see it in this case is the legality of the adoption of Regulation SU 12-1 and the effect of its enforcement upon the appellant. These questions are more of a legal nature than of a factual nature.

Having found that the Board did make sufficient findings of fact in this particular case, there is no authority for the circuit court to remand the case to the Board to make findings of fact or take additional proof.

The appellant next argues that it should be relieved of its obligations under the sales tax law because the operation of its store is substantially the same as the University of Kentucky and Murray University bookstores.

Most of the evidence introduced in this case is directed to the method of operation of the appellant's bookstore and the University of Kentucky and Murray University bookstores. We agree that the operation of the bookstores are substantially identical but we feel that the main distinction is in the ownership of the stores. The appellant's bookstore is not owned by an educational institution. It is a private corporation and Regulation SU 12-1 exempts educational institutions but does not exempt private corporations. The sales tax is not a tax on the buyer but a tax on the seller imposed on the privilege of selling goods at retail. See *Marcum* v. *City of Louisville Municipal Housing Commission*, Ky., 374, S. W. 2d 865. It is the ownership of the bookstore that is controlling rather than its method of operation.

The next point raised by the appellant is that the Department has amended KRS Chapter 139 by regulations. The appellant sets out several regulations that have been adopted by the Department of Revenue in regard to the sales and use tax but the only regulation that has a bearing on this case is Regulation SU 12-1. We are of the opinion that the Department had the authority to issue said regulation under the applicable statutes and constitutional provision. Whether or not the other regulations cited by the appellant were proper is not relevant to the issue in this case and they will not be discussed in this opinion.

The appellant next raises the argument that the Department has acted unreasonably, discriminatorily and arbitrarily in refusing to extend to the appellant the benefits of its regulations relating to educational institutions and in its enforcement of said regulation so as to deny appellant his constitutional right of equal protection of the laws under both the United States Constitution and the Kentucky Constitution. There is no evidence in the record that the Department of Revenue acted unreasonably, discriminatorily or arbitrarily in the adoption of Regulation SU 12-1.

As to the enforcement of Regulation SU 12-1, the appellant raises the point that in order to be exempt from the sales tax the University of Kentucky bookstore should not be open to the general public as stated in the regulation. The evidence establishes that both the University of Kentucky bookstore and Murray University bookstore are open to the general public. There is no evidence in the record, however, to indicate that the Department of Revenue was aware that these bookstores were open to the general public and we do not feel that because of some failure on the part of the Department of Revenue to strictly enforce Regulation SU 12-1 it would indicate any discrimination against the appellant so as to relieve it of its obligation to pay the sales tax under the applicable statute.

As stated in the case of *City of Ashland, et al.* v. *Heck's Inc.*, Ky., 407 S. W. 2d 421, no law ever has been or will be enforced uniformly or without exception and in order to obtain relief under equal protection clause of both the United States Constitution and the Kentucky Constitution, there must be a showing that there has been obvious and flagrant discrimination in the enforcement of a law. There is no such showing in this case.

Because we are affirming the ruling of the Board, we do not feel it necessary to determine whether or not a prior

order of the Kentucky Tax Commission issued June 26, 1964, was res judicata as to the issues raised on this appeal.

We fail to find any legal authority whereby the Department of Revenue could grant the tax relief sought by the appellant. While this might be a hardship on the appellant under the provisions of the applicable statute, constitution and regulations, we do not believe that the Department of Revenue has any authority to grant a tax exemption to the appellant. It would appear that any relief to appellant would have to be done by legislation.

In view of the above, we are of the opinion that the order of the Kentucky Board of Tax Appeals should be affirmed. The Clerk is directed to make this opinion a part of the record herein and the attorneys will prepare a judgment in accordance with same.

(s) L. T. Grant,
Judge, Fayette Circuit Court.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF KENTUCKY.

Section 170.

There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education, public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods of a person used in his home; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or committing property from taxation other than the property above mentioned shall be void. The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location.

KENTUCKY REVISED STATUTES.

KRS 139.200:

For the privilege of making "retail sales" or "sales at retail", a tax is hereby imposed upon all retailers at the rate of three percent of the gross receipts of any retailer derived from "retail sales" or "sales at "retail" made within this state after June 30, 1960.

KRS 139.210:

The taxes herein imposed may be collected by the retailer from the consumer.

KRS 139.310:

An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased on or after July 1, 1960, for storage, use or other consumption in this state at the rate of three percent of the sales price of the property."

KRS 139.470:

There are excluded from the computation of the amount of taxes imposed by this chapter:

(1) Gross receipts from the sale of, and the storage, use or other consumption in the state of, tangible personal property the gross receipts from the sale of which, or the storage, use or other consumption of which, this state is prohibited from taxing under the Constitution or laws of the United States, or under the Constitution of this state; . . .

KENTUCKY SALES AND USE TAX REGULATIONS.

SU 12-1:

Educational Institutions. 1. *Generally*—The term "institution of education" as used in this regulation means a resident, nonprofit school, college, or university, the income of which is devoted solely to education, and where systematic instruction in any and all of the useful branches of learning is given by methods common to schools and institutions of learning. This definition does not include schools for teaching dancing, dramatics, music, riding, gymnastic exercises, and other special accomplishments, nor does this definition include parent-teacher associations, parents' groups, alumni or other such auxiliary organizations with

purposes related to the educational function of an institution or collective group of institutions. No distinction is to be made between public, private, or parochial schools when the determination is made as to whether a particular school comes within the definition.

2. *Sales Tax*—Gross receipts from sales by an institution of education are exempt, if made directly within their function as an educational institution. Examples of activities outside of the educational function would be the sale to the general public of articles resulting from student industries; sales of food and soft drinks by school cafeterias or grills open to the general public; and sales of food, soft drinks, or other property which are incidental to regularly scheduled group meetings the primary purpose of which is purely recreational or social. Even though activities or events may be within the educational function, it does not necessarily follow that the gross receipts from all sales in conjunction therewith would be nontaxable; distinction may be made in regard to those events where the general public is in attendance, and those events where it is not. The following rules are applicable:

(a) Where the general public is invited to an event or activity, gross receipts from sales of admissions to students are not subject to the sales tax, provided however, that the charge for such admissions is prepaid by students as an includable item of tuition, or that the sales are otherwise made direct by the school acting in its own capacity, and in advance of the scheduled event. All sales to the general public, and all sales at the gate, including those to students, of admissions are subject to sales tax. Gross receipts from incidental sales of food, candy, drinks, and other items of property are taxable. The test in the latter situation is whether gross receipts from sales of any of the admissions are subject to tax. Examples of activities where the general public may be invited are school plays, athletic events, lecture series, film and other exhibits, and concerts.

(b) Where activities or events are attended only by students, teachers, instructors, or professors, or combinations thereof, and which are not open to the general public, neither admissions nor incidental sales of food, soft drinks nor primary sales of other property are subject to the sales tax if the activity is within the educational function. Examples are cafeterias which are managed and operated by and as a part of the school and which are not open to the general public and which serve only students, teachers, and employees of the school; school book and supply stores which are managed and operated by and as a part of the school and are not open to the general public (however, gross receipts from sales which are outside of the educational function, such as sales of drugs, cosmetics, clothing and other wearing apparel, jewelry, etc., are subject to the tax); purely student or teacher events where the primary object is within the educational function such as, for example, teacher's meetings; cultural, scientific or other such student society meetings; and nonregularly scheduled events such as pep rallies incidental to athletic contests.

3. *Use Tax*—Generally an institution of education shall not be liable for use tax if the storage, use or other consumption of the subject property is directly within the educational function of the school concerned; however, if the storage, use or other consumption is for some object outside of the educational function, then there shall be liability for the use tax.

KRS 139.100, 139.330, 139.470(1).

SU 14-1:

Religious Institutions. The intent of this regulation is to reconcile the administration by the Department of Revenue of the provisions of Chapter 139.470(1) KRS, as they apply to sales by retailers to religious institutions.

"Exempt purchaser" as used in this regulation means any church established for public worship within this state, its agencies and its parent or governing body.

Every retailer in determining the amount of gross receipts to be entered on Line 1 of his Kentucky Sales and Use Tax Return shall include therein his total receipts from sales to "exempt purchasers". Every retailer may, subject to the provisions stated herein, deduct from gross receipts the receipts from all sales to "exempt purchasers" of tangible personal property of a kind which could be purchased by said "exempt purchasers" either within or without the State of Kentucky and which if purchased out of this state or in interstate commerce would be exempt from both sales and use tax, although stored, used, or consumed by the "exempt purchaser" in this state. The retailer shall be liable for the sales tax upon his gross receipts from such sales unless he receives from the "exempt purchaser" a valid "purchase exemption certificate" on a form prescribed by the Department.

Every retailer making sales of the kind described above shall require an officer or a person exercising comparable authority of the "exempt purchaser" to sign and acknowledge in writing upon a copy of the invoice that delivery of the property was actually made to an "exempt purchaser". Such invoice shall be retained by the retailer as documentary evidence in support of his deduction of the sale from gross receipts. Each invoice shall also have stated thereon the exemption number of the "exempt purchaser", which number shall have been assigned to the "exempt purchaser" upon written application to the Department of Revenue for authorization to make exempt purchases.

The sales tax shall apply to the gross receipts from the sale of tangible personal property and all other retail sales included in KRS 139.100 to an "exempt purchaser" when such tangible personal property or service is of a kind that ordinarily cannot be purchased out of this state or by means

of an interstate sale. Examples of such sales are sales of natural, artificial, and mixed gas, electricity, water, sewer services, and intrastate telephonic and telegraphic communications and services.

The church is considered the consumer of all meals, food and drink served in connection with its religious activities. Sales by churches of tangible personal property other than meals, food and drink served in connection with its religious activities are subject to sales tax.
KRS 139.470.

SU 38:

Sales to and by the State, Its Agencies and Instrumentalities; and Its Political Subdivisions: Use Tax. Sales Tax—Sales to and by the state, its agencies and instrumentalities, and its political subdivisions (e.g. counties and municipalities) must be included in the taxable gross receipts of the seller.

Use Tax—Except as provided in SU 12-1, the storage, use, or consumption of its agencies and instrumentalities, and its political subdivisions are subject to the use tax.
KRS 139.200, 139.310, 139.470.

SU 90:

Deductions for Sales to Institutions and Agencies Exempt from Use Tax under Kentucky or Federal Constitutions. The intent of this regulation is to reconcile administration by the Department of Revenue of the provisions of Chapter 139, Kentucky Revised Statutes, as they apply to sales by retailers to institutions of purely public charity, non-profit charitable hospitals, institutions of education, and exempt federal agencies with the requirements of the Fourteenth Amendment to the Constitution of the United States and of Section 170 of the Constitution of Kentucky.

"Exempt purchaser" as used in this regulation means only:

1. "Institutions of purely public charity" as defined in SU 13-1;

2. "Institutions of education" as defined in SU 12-1;

3. "Hospitals" as defined in SU 10-1; or,

4. Federal agencies, instrumentalities or corporations which are exempt from state taxation under the Federal Constitution or statutes.

Every retailer in determining the amount of gross receipts to be entered on line 1 of his Kentucky Sales and Use Tax Return shall include therein his total receipts from sales to "exempt purchasers". Every retailer may, subject to the provisions stated herein, deduct from gross receipts the receipts from all sales to "exempt purchasers" of tangible personal property of a kind which could be purchased by said "exempt purchasers" either within or without the State of Kentucky and which if purchased out of this state or in interstate commerce would be exempt from both sales and use tax, although stored, used, or consumed by the "exempt purchaser" in this state. The retailer shall be liable for the sales tax upon his gross receipts from such sales unless he receives from the "exempt purchaser" a valid "purchase exemption certificate" on a form prescribed by the Department.

Every retailer making sales of the kind described above shall require an officer or a person exercising comparable authority of the "exempt purchaser" to sign and acknowledge in writing upon a copy of the invoice that delivery of the property was actually made to an "exempt purchaser". Such invoice shall be retained by the retailer as documentary evidence in support of his deduction of the sale from gross receipts. Each invoice shall also have stated thereon the exemption number of the "exempt purchaser", which number shall have been assigned to the "exempt purchaser" upon written application to the Department of Revenue for authorization to make exempt purchases. Except in the case of exempt federal agencies, no purchaser shall be per-

mitted to execute a valid "purchase exemption certificate" until application for exemption has been received and approved by the Department.

The sales tax shall apply to the gross receipts from the sale of tangible personal property and all other retail sales included in KRS 139.100 to an "exempt purchaser" when such tangible personal property or service is of a kind that ordinarily cannot be purchased out of this state or by means of an interstate sale. Examples of such sales are sales of natural, artificial, and mixed gas, electricity, water, sewer services, and intrastate telephonic and telegraphic communications and services.

KRS 139.110, 139.330, 139.470(1), 139.560.